Lembah Kerjaya Sdn Bhd (in liquidation) v Director of Land and Survey & Anor (Selangor Housing and Real Estate Committee, interverner)

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24 NCVC-2364–09 OF 2012
YEOH WEE SIAM J
27 JUNE 2013

Civil Procedure — Order — Exemption — Development of condominium on land — Application to exempt conditions imposed in respect of sale of 70% of units in project and fine of 5% — Whether there was reasonable cause of action to maintain action — Whether there was legal basis for court to grant exemptions — Rules of Court 2012 O 7 r 3

The plaintiff was a developer who was developing a condominium ('the project') on a piece of land. The plaintiff was wound up by its creditors pursuant to a special resolution. The plaintiff had applied to the court and by an order ('the court's order'), the plaintiff was given authority and power to deal with the project, with the purpose of rehabilitation and completion of the project. Subsequently, the plaintiff took steps to complete the project and applied for certificate of fitness on 10 December 2010. However, on 12 December 2010, the Ministry of Housing and Local Government declared the project as an abandoned project. The plaintiff had also applied to subdivide the building to the first defendant on 12 January 2011 and the application was approved subject to payment of relevant fees which were paid on 6 October 2012. The only issue outstanding was the failure of the developer to comply with the conditions laid down by the land officer. In the present application, the plaintiff applied to the court to exempt the conditions imposed in respect of the sale of 70% of the units in the project and the fine of 5%.

Held, dismissing the application with costs of RM5,000:

(1) This application was a non-starter. The plaintiff failed to establish that it had a reasonable cause of action to maintain this action as required by O 7 r 3 of the Rules of Court 2012 ('the ROC'). There was no legal basis for the court to grant the exemptions sought by the plaintiff. In order to grant an exemption of the same, there must be an express statutory provision empowering the court to make such an order. Unfortunately for the plaintiff, there was no legal provision enacted under any law to provide for the court's intervention on an issue which was well within the powers of the defendants (see para 15).

(2) Section 124(5)(c) of the National Land Code would be applicable here.

The plaintiff was legally bound to comply with the additional conditions imposed by the state authority through the Majlis Mesyuarat Kerajaan Negeri Selangor ('MMKN'). The MMKN's decision was communicated to the plaintiff by the Pejabat Daerah/Tanah Sepang before the plaintiff went into liquidation. The plaintiff did not challenge the MMKN decision. Therefore, the MMKN's decision was still binding on the plaintiff (see paras 17 & 19).

(3) It was not for the court to intervene in this matter. It was further noted that this application was for exemption of the 7% and 5% payments imposed, and it was not an application for judicial review of any decision made by the defendants and the intervener. The court was therefore unable to grant the plaintiff the reliefs sought (see para 19).

(4) The court order did not provide the legal basis or excuse for the plaintiff not to comply with the additional conditions imposed by the MMKN's decision. It was highly doubtful whether the plaintiff's default in payment of the repayment of the selling price of 7% and fine of 5% from the selling price of each *Bumiputra* unit could be considered a debt, much less an unsecured debt under s 292 of the Companies Act 1965 ('Act') (see paras 23 & 25).

(5) It was not for the plaintiff to even suggest that the defendants file the proof of debt under the Act. It was the prerogative of the defendants, in particular, the second defendant, through the MMKN, to impose the additional conditions on the 7% repayment and the 5% fine. It was therefore incumbent upon the plaintiff to comply with such additional conditions imposed under the MMKN's decision, or under any other decision of the MMKN (see para 26).

[Bahasa Malaysia summary

Plaintif adalah pemaju yang membangunkan pangsapuri ('projek') atas sebidang tanah. Plaintif digulung oleh pemiutang-pemiutang berikutan resolusi khas. Plaintif memohon kepada mahkamah dan dengan perintah ('perintah mahkamah') plaintif diberi kuasa dan kebenaran untuk mengendalikan dengan tujuan pemulihan dan penyiapan projek tersebut. Plaintif kemudiannya mengambil langkah untuk menyiapkan projek dan memohon untuk sijil kelayakan didiami pada 10 Disember 2010. Walau bagaimanapun, pada 12 Disember 2010, Kementerian Perumahan dan Kerajaan Tempatan mengisytiharkan projek sebagai projek terbengkalai. Plaintif juga memohon untuk membahagikan bangunan kepada defendan pertama pada 12 Januari 2011 dan permohonan diluluskan tertakluk kepada bayaran fi yang relevan yang mana dibayar pada 6 Oktober 2012. Satu-satunya isu yang belum diselesaikan adalah kegagalan pemaju untuk mematuhi dengan syarat-syarat yang ditetapkan oleh pegawai tanah. Dalam pormohonan ini,

plaintif memohon kepada mahkamah untuk mengecualikan syarat-syarat yang dikenakan berkaitan jualan 70% unit di dalam projek dan denda sebanyak 5%.

Diputuskan, menolak permohonan dengan kos sebanyak RM5,000:

(1) Permohonan ini adalah sia-sia. Plaintif gagal membuktikan bahawa ia mempunyai kausa tindakan munasabah untuk mengekalkan tindakan ini seperti yang dikehendaki oleh A 7 k 3 Kaedah-Kaedah Mahkamah 2012 ('KKM'). Tiada asas undang-undang untuk mahkamah memberikan pengecualian yang dipohon oleh plaintif. Untuk memberikan pengecualian bagi perkara yang sama, perlu ada peruntukan statutori yang jelas memberikan kuasa kepada mahkamah untuk membuat perintah sedemikian. Malangnya bagi plaintif, tidak terdapat peruntukan undang-undang yang digubal di bawah mana-mana undang-undang untuk memperuntukkan untuk campur tangan mahkamah atas isu yang terangkum dalam kuasa defendan-defendan (lihat perenggan 15).

(2) Seksyen 124(5)(c) Kanun Tanah Negara akan diguna pakai di sini. Plaintif secara undang-undang terikat untuk mematuhi dengan syarat-syarat tambahan yang dikenakan oleh pihak berkuasa negeri melalui Majlis Mesyuarat Kerajaan Negeri Selangor ('MMKN'). Keputusan MMKN dikomunikasikan kepada plaintif oleh Pejabat Daerah/Tanah Sepang sebelum plaintif dilikuidasikan. Plaintif tidak membantah keputusan MMKN. Oleh itu, keputusan MMKN masih mengikat ke atas plaintif (lihat perenggan 17 & 19).

(3) Bukan untuk mahkamah campur tangan dalam perkara ini. Ia selanjutnya dimaklumkan bahawa permohonan ini adalah untuk pengecualian sebanyak 7% dan 5% ke atas bayaran yang dikenakan. Mahkamah oleh itu tidak dapat untuk memberikan plaintif relief yang dipohon (lihat perenggan 19).

(4) Perintah mahkamah tidak memperuntukkan asas undang-undang atau alasan untuk plaintif tidak mematuhi syarat-syarat tambahan yang dikenakan dengan keputusan MMKN. Adalah sangat diragui sama ada kegagalan dalam membayar bayaran semula harga jualan sebanyak 7% dan denda sebanyak 5% daripada harga jualan setiap unit Bumiputra boleh dipertimbangkan sebagai hutang, apa lagi hutang yang tidak bercagar di bawah s 292 Akta Syarikat 1965 ('Akta') (lihat perenggan 23 & 25).

(5) Bukan untuk plaintif mencadangkan bahawa defendan-defendan memfailkan bukti hutang di bawah Akta. Ia adalah prerogatif defendan-defendan, terutamanya, defendan kedua, melalui MMKN tersebut untuk mengenakan syarat-syarat tambahan ke atas 7% bayaran semula dan denda sebanyak 5%. Oleh itu adalah wajib ke atas plaintif

untuk mematuhi dengan syarat-syarat tambahan sedemikian yang dikenakan di bawah keputusan MMKN, atau di bawah apa-apa keputusan lain oleh MMKN (lihat perenggan 26).]

Cases referred to

Government of Malaysia v Lim Kit Siang United Engineers (M) Berhad v Lim Kit Siang [1988] 2 MLJ 12, SC (refd)

Legislation referred to

Companies Act 1965 ss 291, 292
National Land Code s 124(5), (5)(c)
Rules of Court 2012 O 7 r 3

J Rajaretnam (Adha Selvi & Associates) for the plaintiff/liquidator.
Salwati bt Omar (State Legal Advisor, Selangor Legal Advisor Offices) for the first and second defendants.
Chong Pow Yew (Kamaruzaman Arif Amran & Chong) for the intervener.

Yeoh Wee Siam J:

ENCLOSURE 1

[1] This is the originating summons filed by the plaintiff applying for the following orders:

(a) the defendants exempt the plaintiff in liquidation from the condition that 70% of units in the Condominium Putra Intan Project ('the project') be sold to *Bumiputra*;

(b) the defendants discharge and/or exempt the plaintiff in liquidation from refunding the discount on the *Bumiputra* selling price in the sum of 7% and the payment of a further 5% as a fine for non-compliance of the sales quota before the titles can be registered;

(c) the first defendant gives a blanket consent to the transfer the title to each purchaser of the units in the project as stated in the list provided by the plaintiff in liquidation;

(d) the first defendant registers the strata title to each purchaser of the units in the project as stated in the list provided by the plaintiff in liquidation;

(e) cost; and

(f) such further or other relief as this honourable court deems fit.

BACKGROUND FACTS

[2] The plaintiff / developer ('the plaintiff') was developing a condominium ie a block of eight to ten floors consisting of 210 units and a block of eight to nine floors consisting of 30 units, together with common facilities ('the project') on a piece of land held under PM 3012, Lot 18983, Pekan Dengkil, Tempat Batu 1, Jalan Air Hitam, Pekan Dengkil Daerah Sepang Negeri Selangor.

[3] The plaintiff was wound up by its creditors pursuant to a special resolution dated 10 March 2009 (para 5 and exh JSR–4 of encl 2 at pp 16 and 17).

[4] The liquidator ('the plaintiff') was appointed as the liquidator by the same special resolution.

[5] The plaintiff had applied to court and by the order dated 10 December 2009 ('the court order'), the plaintiff had been given the authority and power to deal with the project, with the purpose of rehabilitation and completion of the project (para 5 and exh JSR–5 of encl 2 at pp 20–22).

[6] The plaintiff had, immediately upon the issuance of the court order, taken steps to complete the construction of the buildings in the project and applied for the certificate of fitness which was obtained on 10 December 2010 (para 8 and exh JSR–6 of encl 2).

[7] The Ministry of Housing and Local Government had on 12 December 2010 declared the project as an abandoned project (para 7 of encl 2).

[8] The plaintiff had also applied to subdivide the building to the first defendant on 12 January 2011 which application for subdivision was approved subject to payment of the relevant fees. The fees were paid on 6 October 2012.

[9] The only issue outstanding was the failure of the developer to comply with the conditions laid down by the Pejabat Daerah/Tanah Sepang in its letter dated 22 April 1998 (para 3 and exh JSR–2 at pp 8 and 9 of encl 2).

[10] The plaintiff had applied to the defendants for exemption from the conditions imposed in respect of the sale of 70% of the units in the project to *Bumiputra*, which exemption was allowed but with the imposition of a refund of 7% and a fine of 5% of the purchase price in respect of each unit which was not sold to *Bumiputra* (paras 10, 11 and 12 and exhs JSR–8, JSR–9 and JSR–10 of encl 2).

[11] The intervener in its letter dated 10 February 2012 had stated:

> syarat bayaran balik potongan harga Bumiputra sebanyak 7% dan denda langgar syarat kuota sebanyak 5% daripada harga jualan setiap pangsapuri tersebut kepada pentadbiran ini sebelum hakmilik boleh didaftarkan.

[12] The plaintiff had sold 232 units between May and June 2006, with only 54 units sold to *Bumiputra* (para 3 and exh JSR–3 at pp 12–14 of encl 2).

[13] The plaintiff applied to this court to exempt the conditions as stated above, since the payments imposed on the plaintiff ie the refund of 7% and the fine of 5% have been made a condition precedent to the transfer of the individual units to each individual purchaser.

THE COURT'S DECISION GIVEN ON 23 MARCH 2003 REGARDING ENCL 1

[14] The plaintiff's application is dismissed. Costs of RM5,000 are to be paid forthwith by the plaintiff to the defendants and the intervener jointly.

GROUNDS OF DECISION

[15] The court has deliberated on this matter and finds that there is no legal basis for the court to grant the exemptions sought by the plaintiff. In order to grant an exemption of the same, there must be an express statutory provision empowering the court to make such an order. Unfortunately for the plaintiff, there is no legal provision enacted under any law to provide for the court's intervention on an issue which is well within the powers of the defendants.

As submitted by counsel for the intervener, this application is a non-starter. The plaintiff has failed to establish that it has a reasonable cause of action to maintain this action as required by O 7 r 3 of the Rules of Court 2012 ('the ROC') (see *Government of Malaysia v Lim Kit Siang United Engineers (M) Berhad v Lim Kit Siang* [1988] 2 MLJ 12).

[16] The Majlis Mesyuarat Kerajaan Negeri Selangor ('MMKN') in its decision dated 11 March 1998 ('the MMKN's decision') (exh JSR–2 p 9 para 3) had imposed the additional conditions on the plaintiff as follows:

> 70% penjualan bangunan kediaman hendaklah dikhaskan kepada pembeli-pembeli Bumiputra dengan diberi potongan harga 7% (kecuali rumah kos rendah).

The additional conditions imposed by the state authority/the second defendant have the force of law. This is provided in s 124(5) of the National Land Code ('the NLC') which states:

(5) Any direction given by the state authority under this section may be made conditional upon all or any of the following matters: A

(a) the payment of a further premium;

(aa) the payment of any other charges as may be prescribed;

(b) the reservation of a new rent; B

(c) compliance with such other requirements as the state authority may think fit.

[17] In particular, s 124(5)(c) of the NLC is applicable here. The plaintiff is C therefore legally bound to comply with the additional conditions imposed by the state authority through the MMKN.

[18] The MMKN decision was communicated to the plaintiff by the Pejabat D Daerah/Tanah Sepang in its letter dated 22 April 1998 before the plaintiff went into liquidation.

[19] The plaintiff did not challenge the MMKN decision. Therefore, the MMKN Decision is still binding on the plaintiff. It is not for the court to E intervene in this matter. It is further noted that this application is for exemption of the 7% and 5% payments imposed, and it is not an application for judicial review of any decision made by the defendants and the intervener. The court is therefore unable to grant the plaintiff the reliefs sought under this application. F

[20] The intervener's decision dated 10 February 2012 (exh JSR-9), which was communicated to the plaintiff through the intervener's letter dated 10 February 2012, informed the plaintiff, inter alia, the following in para 3: G

> Pihak tuan dikenakan syarat bayaran balik potongan harga Bumiputra sebanyak 7% dan denda langgar syarat kuota sebanyak 5% daripada harga jualan setiap pangsapuri tersebut kepada pentadbiran ini sebelum hakmilik boleh didaftarkan. Untuk makluman tuan, adalah menjadi dasar Kerajaan Negeri di mana setiap unit hartanah kuota Bumiputra yang telah dijual kepada pembeli bukan Bumiputra sebelum mendapat kelulusan, dikenakan bayaran 7% potongan harga Bumiputra (rumah) dan 5% denda melanggar syarat kuota yang ditetapkan. (exh JSR–9). H

Here again, it is to be noted that the plaintiff did not challenge the intervener's decision. The plaintiff is still bound to comply with the intervener's decision which basically reflects and reiterates the MMKN's decision and the policies of I the state government/the second defendant.

[21] As submitted by counsel for the first and the second defendants, the imposition of the refund/repayment of 7% and the fine of 5% is based on the

policy of the state government since it was found that there are still developers who breached or did not comply with any conditions imposed by the state authority. In fact, the first defendant had issue a circular ie *Pekeliling Pengarah Tanah dan Galian Selangor Bil 3/2007* (pp 6–20 of the defendants' bundle of authorities). This circular was by way of notification to members of the public, including the liquidator, on the consequences of non-compliance with the additional conditions imposed by the state government.

[22] Counsel for the plaintiff submitted that vide the court order dated 10 December 2009, the liquidator was appointed by the creditors of the developer to administer the developer company in the interest of its creditors. The primary purpose of the court order is for the liquidator to revive, rehabilitate and complete the project for the benefit of the purchasers, and the end purchasers ought not to be penalised by the developer's non-compliance of the sales quota to *Bumiputra*.

[23] However, I am of the view that the court order does not provide the legal basis or excuse for the plaintiff/liquidator not to comply with the additional conditions imposed by the MMKN's decision.

[24] Counsel for the plaintiff further submitted that the recovery of the 7% of the discounted purchase price to *Bumiputra* and the fine of 5% of the purchase price for every *Bumiputra* unit sold to a non-bumiputra should be recovered from the developer by the defendants or interveners by filing their proof of debt pursuant to s 291 of the Companies Act 1965 which, inter alia, provides:

> … all debts payable on a contingency and all claims against the company present or future certain or contingent ascertained or sounding only in damages shall be admissible to proof against the company …

[25] It is highly doubtful whether the plaintiff's default in payment of the repayment of the selling price of 7% and fine of 5% from the selling price of each *Bumiputra* unit can be considered a debt, much less an unsecured debt under s 292 of the Companies Act 1965.

[26] The court is of the opinion that it is not for the liquidator to even suggest that the defendants file the proof of debt under the Companies Act 1965. It is the prerogative of the defendants, in particular, the second defendant through the MMKN to impose the additional conditions on the 7% repayment and the 5% fine. It is therefore incumbent upon the plaintiff and/or liquidator to comply with such additional conditions imposed under the MMKN's decision, or under any other decision of the MMKN.

Based on the above considerations, I therefore ordered accordingly.

Application dismissed with costs of RM5,000.

Reported by Afiq Mohamad Noor